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No. 79-870

In the

Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES RAILROAD RETIREMENT BOARD,

Appellant,

v.

GERHARD H. FRITZ, on his own behalf and on behalf of all those similarly situated,

Appellee.

On Appeal From The United States District Court
For The Southern District Of Indiana

MOTION TO AFFIRM

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MOTION TO AFFIRM

Appellee moves the Court to affirm the appeal herein on the ground that the questions on which the decision of this cause depends are so unsubstantial as not to warrant further argument.

JURISDICTION

Appellee agrees with appellant that the Court has jurisdiction of this appeal pursuant to 28 U.S.C. §1252.

QUESTION PRESENTED

Appellant has misstated the question of this appeal. Appellee has not challenged section 3(h) of the Railroad Retirement Act of 1974 on the grounds that it discriminates on the basis of length of service. The question presented is, instead, correctly stated as follows: Whether section 3(h) (1) of the Railroad Retirement Act of 1974, 45 U.S.C. §231b(h) (1), violates the equal protection component of the Due Process Clause of the Fifth Amendment because it irrationally distinguishes between classes of similarly situated vested annuitants by depriving the members of one class of "dual benefits" solely because they were not currently affiliated with the railroad industry in 1974.[1]

STATUTE INVOLVED

Only section 3(h) (1) of the Railroad Retirement Act of 1974, 45 U.S.C. §231b(h) (1), is at issue in this appeal. It is set out in the Appendix to the Jurisdictional Statement, at 38a-39a.

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[1] A "current affiliation" as used by both the appellant, Jurisdictional Statement at 2, and the appellee, means having a "current connection" with the railroad industry as of December 31, 1974 (twelve month service out of the preceding thirty months, 45 U.S.C. §231(o)), or having worked for the railroad industry for even just one day in calendar 1974.

STATEMENT OF THE CASE

Appellant's Statement of the Case set forth at 2-15 in its Jurisdictional Statement is incomplete. A further development of the facts is necessary for a fair understanding of the question presented.

This case is a result of changes in the railroad retirement system effected by the Railroad Retirement Act of 1974. Prior to its implementation, employees who had worked sufficiently in railroad and non-railroad industries were entitled to benefits under both Railroad Retirement and Social Security. Their total benefits under the two programs were larger than the amounts they would have received had they worked in employment covered under only one plan or the other.

The 1974 Act sought to gradually eliminate these additional payments, known as dual benefits. This phaseout permitted those who were retired and receiving benefits by the effective date of the Act (January 1, 1975) to continue their eligibility. Conversely, those still working but not permanently insured under Social Security by the effective date were denied future entitlement to dual benefits. The remainder were divided into two groups. Those with twenty-five years of railroad service had their rights to dual benefits protected. The other group, with at least ten years of railroad credit and thus permanently insured for railroad retirement coverage as well, were then subdivided into two groups. Those who were then currently affiliated with the railroad industry i.e., those who had a "current connection" or who worked for the railroad industry for even just one day during 1974, had their vested rights protected. The others with the same

years of railroad credit lost their vested rights to dual benefits. This divested sub-group comprises appellee's class.

This elimination of dual benefits was not the first instance in which that action occurred. The 1951 amendments to the Railroad Retirement Act of 1937 (Pub.L. No. 82-234) similarly affected some railroaders. To the extent that Social Security and Railroad Retirement benefits were the result of credit given by both programs for pre-1937 service (before Social Security and Railroad Retirement existed), an offset was imposed, in effect eliminating dual benefits.[2] Because Congress later determined that the 1951 action was inequitable, and "discriminated against a special group of retired employees," it repealed the off-set in 1954, retroactive to 1951, thereby restoring dual benefits to all those previously eligible. Pub.L. No. 83-398 (1954). H.Doc.No. 758, 83d Cong., 1st Sess., 6-9 (1953). Representative Wolverton, who sponsored the repeal, indicated that Congress had not been sufficiently informed of the effect of its earlier action:

> "I believe that the term 'dual benefit provision' was chosen deliberately and for the purpose of misinforming all persons who have occasion to study this provision. I believe that this terminology was responsible, at least in part, for the adoption of this legislation by the 82nd Congress. This terminology is misleading and designed to hide the fact that the provision which this legislation would repeal has wiped out or curtailed certain retirement benefits which railroad employees had every reason to believe were inviolate." 99 Cong.Rec. A4508 (daily ed., July 17, 1953).

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[2] These benefits had been based based on credits for which no contributions had been paid, in contrast to the dual benefits effected by the 1974 Act.

The effort which culminated in the 1974 Act had its genesis in the creation by Congress of the Commission on Railroad Retirement. The Commission was explicitly organized as an impartial tribunal, its five members consisting of one railroad management representative, one railroad union representative, and three public representatives. Pub.L. No. 91-377, at §7(a)(1). The President appointed three, the Speaker of the House one, and the President Pro Tem of the Senate the last.

Of the Commission's four major recommendations, one is directly applicable to the issue of this case:

> "2. *Legally vested rights of railroad workers and railroad retirement beneficiaries to benefits based on social-security-covered non-railroad service should be guaranteed, but future accrual of these dual benefits should be stopped.*" Report of the Commission on Railroad Retirement, H.Doc.No. 92-350, 92d Cong., 2d Sess., at 4 (1972) (emphasis in original). *See also id.*, at 368.

In the extensive elaborations upon this recommendation in the body of the Commission Report, the Commission repeatedly emphasized that dual benefits should be phased out, but with entitlement thereto protected for retirees already receiving them and for those like appellee's class whose rights had already vested. This final determination by the Commission was thus the protection of all vested rights, regardless of other indices of employment. *E.g.*, Commission Report, *supra,* at 21, 156, 344, 369.

After submission of the Commission Report to Congress the next significant step was the creation of the Joint Labor-Management Negotiating Committee ("JLMNC" or "Committee"). Its members were directed to negotiate and prepare a bill to restructure the railroad retirement system to make it actuarially sound. Pub.L. No. 93-69,

§108 (1973). They were not told to increase any existing benefits, and they were explicitly directed to "take into account the specific recommendations of the Commission on Railroad Retirement." *Id.*, at §107(c)(1). Unlike its predecessor, the Committee was not a neutral organization; labor and management were permitted to make their own appointments without review or consent of Congress, *id.*, at §107(a), and there was no representative of the public or of retired railroaders on the Committee.

In essence, it was the bill prepared by this Committee that became the 1974 Act; its only significant departures from the recommendations of the Commission were: (i) the divestiture of the appellee class and (ii) an increase in benefits to certain present recipients which was possible only because of that divestiture. The actuarial deficiencies of the railroad fund, which had initially aroused congressional concern, were resolved by actions other than that taken against the appellee class.

The appellee and his class[3] in this action are those who

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[3] The certified class included only those former railroaders who were injured by the discrimination engendered by subsection (h)(1) and who wrere retired *as of January 1, 1977*. In arriving at its decision, the district court recognized that its holding as to this certified subclass of former railroaders (about 5000) would also apply to the larger, uncertified general class (about 86,000) of former railroaders injured by subsection (h)(1) who bear the same characteristics as the certified subclass but who would retire *after January 1, 1977* (Appellant's Appendix A, at 31a-32a). Since both the appellee and the appellant (Appellant's Jurisdictional Statement, at 12-13 n.7) recognize that the Court's decision as to the certified class equally impacts upon the general class, the appellee for purposes of this discussion is not distinguishing between the certified subclass and the uncertified general class.

were completely divested by the 1974 Act. Appellant implies that the main effect of that Act was merely to reduce the dual benefits of some recipients (see Jur. St., at 9-10 § n.5), but this case is concerned with the estimated 86,000 former railroaders who have been or will be denied all of the dual benefits in which they were vested prior to the effective date of the Act. It is the effect of subsection (h)(1) which is at issue in this appeal. It is true, as appellant notes, that the fate of (h)(2) must follow that of (h)(1) (Jur.St., at 12-13 n.7). But the issue of this appeal is the propriety of the decision to repudiate the vested rights of a portion of retired railroaders for the sole reason that they were not currently affiliated with the railroad industry in 1974. It is they who have borne the full brunt of the Committee's actions.

THE DENIAL OF DUAL BENEFITS TO SOME VESTED BENEFICIARIES REPRESENTS INVIDIOUS DISCRIMINATION FOR WHICH THERE IS NO RATIONAL BASIS

It is indisputable that Congress could have conclusively eliminated dual benefits for everyone. See Jur.St., at 16. But Congress chose instead, as recommended by the Commission, to phase out dual benefits. It is the *nature* of that decision which is the subject of this appeal, for "the manner in which [a legislature] dispenses benefits is subject to constitutional limitations." *Maher* v. *Roe*, 432 U.S. 464, 470 (1977). Specifically, the decision to favor one class over another must be a reasonable one. "A general rule may not define the benefited class by reference to a distinction which irrationally differentiates between identically situated persons." *Califano* v. *Jobst*, 434 U.S. 47, 53 (1977).

Appellant attempts repeatedly to support the distinction between classes in this situation as a typical and permissible legislative effort to draw lines on the basis of duration of railroad service. See Jur.St., at 16, 18. This case, however, is not a challenge to a limitation designed to define those who meet the threshold service requirements for eligibility; those requirements, by definition, have been previously established and met by both the favored and disfavored classifications. Thus, all members of the two classes have compiled more than ten but less than twenty-five years of service in the railroad industry, and were permanently insured under the Social Security Act by December 31, 1974. *See* 45 U.S.C. §231(r). In those respects, they have all met the standards established for "vested" status.

The only distinction between the protected and unprotected classes essentially amounts to the timing of their railroad services—*not* the duration of their railroad service.[4] And this timing requirement was imposed *after* appellee's class had already achieved vesting and entitlement to the dual benefits in strict accordance with the law as it then existed. The two alternative additional require-

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[4] A separate classification are those former railroaders with more than 25 years of railroad service. Appellee did not contest this favored classification because the setting of arbitrary periods of service as eligibility requirements does not implicate the equal protection clause. It is reasonable to classify railroaders with more than 25 years as "career" railroaders who are in a different position than those with 10-25 years of services. Similarly, appellee has no dispute with the determination to deny dual benefits to those with less than ten years of service, as the ten-year mark has historically and reasonably divided vested and non-vested railroaders.

ments in subsection (h)(1), that the railroader have a current connection or that he have worked in the railroad industry for at least one day in 1974, do not define the protected classification by reference to the extent of their credited service, but only with respect to the timing of their service in the railroad industry. Thus, far from awarding those with longer periods of railroad service with a continued right to dual benefits, the classificatory scheme capriciously ignores the duration of railroad service in favor of its timing.

As a result, for instance, a man such as class member William Kirby, who was forced to leave the railroad industry with over 22 years of credited service, is divested of his right to dual benefits because he finished his work-life in Social Security—covered employment, while an individual with only eleven years of railroad service, who came into that industry at the end of his career (or who returned to it briefly, perhaps for only a few days in 1974), has his vested rights recognized. It cannot be emphasized sufficiently that this is not merely the occasional inequitable result of the classificatory scheme; it is the rule. By definition, the individuals in both classes worked for the same number of years in the railroad industry and were permanently insured in Social Security. As a result, there will be as many former railroaders in the divested class with nearly twenty-five years of credit as in the protected class.

The patent irrationality of the discrimination against the appellee class is further exemplified by that discrimination's violation of one of Congress's basic purposes for

the 1974 Act—the preservation of the dual earned benefit for *all* "vested" railroaders.

> "Persons who already have vested rights under both the Railroad Retirement and Social Security Systems will in the future be permitted to receive benefits computed under both systems just as is true under existing law." S. Rep. No. 93-1163, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 5702. *See also,* H.R. Rep. No. 93-1345, 93d Cong., 2d Sess. 2 (1974).

The discrimination against the appellee class thus was not only not related to the objectives of the 1974 Act, that discrimination was, in fact, contrary to the objectives.

The other purpose of the 1974 Act was to resolve the perceived actuarial dilemma of the railroad retirement system. Commission Report, at 3. Consequently, the Commission looked to the causes of the fund's precarious financial position, and isolated the payment of dual benefits as a significant factor.[5] From that point the Commission then resolved to phase out dual benefits, rather than to eliminate them entirely, on the grounds that vested entitlement should be recognized:

> "There is considerable validity in this point insofar as it applied to rights which have been earned on the basis of *past* service under the statutes which governed that service. If rights to dual benefits are already *vested,* i.e., if employees are already *permanently* or *fully* insured under social security, caution must be exercised with respect to modifying these benefits, and the Commission has endeavored in its recommendations to provide fair treatment on this

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[5] It was estimated that 38% of all railroaders were receiving dual benefits in 1971. Commission Report, at 22.

> score. However, the argument cannot validly be extended to forestall the Government from rationalizing the present inequitable and over-costly statutory benefit structure to keep it from yielding windfall benefits based on future service." Commission Report, at 352 (emphasis in original). *See also* S.Rep.No. 93-1162, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News, at 5710.

Throughout the Report, therefore, the Commission emphasized that vested status should be the determinative factor for future receipt of dual benefits. So that there would be no doubt as to its intention, the Commission defined "legally vested", "vested benefit", and "vesting". *See* Commission Report, at 552, 555. The effect of this conclusion was protection of the rights of those who had met the minimum length of service requirements: ten years in the railroad industry, and permanently vested in Social Security.[6]

That the scheme ultimately selected does not rationally further the goals of the Act is evident from an evaluation of both the manner in which that scheme was devised and the scheme itself. The best that can be said about the requirements which divested the plaintiff class is that they were not fully explained or understood; the worst interpretation of their exclusion is that the Committee, led by its labor members, set out explicitly to to increase the benefits of certain beneficiaries by divesting the appellee class of their vested rights, and accomplished this by misleading and confusing Congress as to the nature of the changes. Regardless of which depiction is more accurate, the simple fact is that the "sacrifice" of

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[6] Generally, that is also a ten-year requirement, but it can be less. See 42 U.S.C. §414(a).

the appellee class was unnecessary for protecting the actuarial soundness of the fund and was accomplished without Congress recognizing that some vested beneficiaries would lose their rights under the 1974 Act.[7]

The Joint Labor-Management Negotiating Committee initially recognized the propriety of all of the Commission's recommendations. Indeed, all major recommendations were implemented, except for that one which preserved benefits for all vested beneficiaries. The appellee class lost its vested entitlement for reasons unrelated to the actuarial problems of the fund which had caused the initial congressional concern. The 9 per cent deficiency which was at the root of that concern was resolved by restructuring the benefit formula and receipt of funds from the Treasury. Burner Deposition, Exhibit J. Committee letter of April 10, 1974 to Sen. Harrison Williams, at 9. But an additional 3 per cent deficiency had been created by the demands of the Committee's labor-appointed representatives that increases be provided for three groups of present beneficiaries. *Id.*, at 6. *See also* S.Rep.No. 93-1163, *supra,* at 5705. These increases led directly to the determination to divest the appellee class of their dual benefits:

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[7] Indeed, no explanation of or reference to the favored class whose entitlement was guaranteed because they worked in the railroad industry in 1974 appears in the discussions of this provision. The Committee did not even refer to it in its letter to Senator Williams of April 10, 1974 setting out the essence of its determinations. Burner Deposition, Exhibit J. Whether this was a mere oversight, or an additional effort at obfuscating its purposes, is unknown. It remains, however, that the "work-in-1974" rule bears even less relation to the purported goals of the Act than does the so-called "current connection" rule.

> "[T]hese reductions in future payments are offset in part by three liberalizations in benefits designed to make fully effective the early retirement provision which was enacted last year. The three liberalizations which the bill would provide have a level cost of 3.1 per cent of taxable payroll. . . ." S.Rep.No. 93-1163, at 5705.

And:

> Mr. Dennis [Chief Labor Negotiator of the Committee, after elimination of the appellee class from vested status at a JLMNC meeting]: ". . . keep the current law in effect with certain changes which come to about 3 per cent, but savings to the plan come to a lot more on the deficit picture. The dual benefits and other things would save a lot more than the new benefits would cost." Burner Deposition, Exhibit I (March 18, 1974, JLMNC meeting).[8]

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[8] A virtually identical effort was made with the 1951 amendments. In that instance, the elimination of dual benefits for some railroaders also allowed the increase of benefits to others. In urging its repeal, Representative Wolverton made these observations, which are equally applicable in the present context: "It has been claimed, and with some justice, that this detrimental treatment of some to the advantage of others creates a real violation of constitutional principles. . . . The unfairness of this provision is so manifest that those who oppose its repeal have been forced to advance innumerable sophistries in an effort to make a shadow of a case in favor of its retention. The only real reason . . . , however, for the continued retention of this provision is that it is expected to save the fund an amount sufficient to pay higher benefits to others . . . . [But] the financial soundness of the fund is not jeopardized by the repeal of this provision. Nor, at this time, can any valid argument be made that the condition of the fund requires the retention of this manifestly unfair and discriminatory provision." 99 Cong. Rec. A4508-A4509 (daily ed., July 17, 1953).

The rationale for this sell-out of the appellee's class was also provided by Mr. Dennis: "I think we are close on duals, although there is still a way to go. I personally care less about those who are not vested and those who left the railroads . . . ." Burner Deposition, Exhibit I (March 20, 1974, JLMNC conference). In short, those who had vested and then had left the railroad industry (appellee's class) were wrongly considered equivalent to those who had not established a vested right.

On April 10, 1974, the Committee simultaneously presented their proposed bill to its sponsors, Senator Williams and Representative Staggers, and issued a press release. The latter cynically and incorrectly implied that the Committee had followed the Commission recommendations:

> "A principal recommendation of the joint rail-union group relates to dual benefits. The Commission on Railroad Retirement recommended that these benefits be phased out gradually in order to protect existing employees and beneficiaries. The joint rail-union group agreed in general with this recommendation." Duensing Deposition, Exhibit Q.

This "agreement in general" is equivalent to what the appellant now terms a "refinement" of the Commission's recommendation: the divesting of an estimated 86,000 vested former railroaders.

The deception, or confusion, continued during congressional hearings. Representative Dingell sensed "a sleight of hand" and that "somebody has to get it in the neck on this." But he was informed instead by the Negotiating Committee that "this is a situation in which everybody wins." Hearings on H.R. 15301, 93d Cong., 2d Sess., 199, 201 (1974). Indeed, in either the confusion of the

moment or in a concerted effort to avoid the logical conclusion of Dingell's questioning, William Dempsey, Chairman of the National Railroad Labor Conference and Chief Management Negotiator of the bill, stated:

> "This part on the top is the cost of the gradual phaseout of dual benefits, that is, the protection to be accorded to people who are on the rolls now receiving dual benefits and those who are vested under both systems as of January 1, 1975, the idea of the Commission being, and we agree with this, that these individuals had a right to rely upon the law as it existed when they were working. They have made their contributions. They have relied upon the law. They . . . should be protected." Hearings on H.R. 15301, 93d Cong., 2d Sess., 213-214 (1974) (emphasis supplied).

Passage of the bill in the fall of 1974 still did not bring the issue into the open. A press release distributed by the Railroad Retirement Board evidenced either a misperception by the Board as to the effect of the Act—or an intentional effort to deceive:

> "One of the most important changes in the railroad retirement system effects the gradual phase-out of dual benefits . . . . However, employees who retired before the changeover date of January 1, 1975 will still continue to receive at least the same amounts of railroad retirement and social security benefits they were receiving before changeover. Also, employees retired after changeover who were fully vested for both railroad retirement and social security benefits before the changeover will receive an additional amount in the tier II portion of their annuity, generally referred to as a 'windfall' amount." Document 23 to Defendant's Response to Plaintiff's Request for Admissions, filed Feb. 9, 1979.

Only when former railroaders began retiring in 1975 did they discover that their vested status had been ignored. At that point, with complaints increasing, Congress began to consider its actions. Senator Domenici, in proposing S.467, which would have repealed the dual benefit denial, stated:

> "The interests and concerns [of those adversely affected] were simply not taken into account in our haste to pass the 1974 amendments . . . . Their side of the question was never really considered or represented . . . . We, in Congress, cannot change laws adversely affecting thousands of Americans, and expect their continued faith and support in government. Surely changes in laws are necessary, but we should also be mindful of those overlooked in the process." 123 Cong. Rec. S1448 (daily ed., January 26, 1977).

A newspaper article published on July 25, 1976 apparently both stirred Congress' interest and placed the Board and former Committee members on the defensive. The article, which quoted numerous individuals involved in the drafting and passage of the 1974 Act, explicitly stated that the labor negotiators had determined that former railroaders could be sacrificed because they were no longer union members. Washington Post, July 25, 1976. The effect of his article was soon evident; in a Senate Subcommittee on Labor hearing convened to consider Senator Williams' proposed technical amendments to the 1974 Act, conversation centered principally on the *Post* article and on the vested rights which had been eliminated. William Dempsey devoted most of his testimony to the issues raised by the *Post* article. Instead of directly facing the issue, he relied on the old stand-by

that all dual benefits are inequitable,[9] and stated that they were partially eliminated by the 1974 Act: "The touchstone finally agreed upon and reflected in the legislation had to do with vesting." Hearing before Subcommittee on Labor on S. 3662, 94th Cong., 2d Sess., at 49 (Sept. 8, 1976). And, still failing to explain clearly that some vested beneficiaries were protected while others were not, he continued to obfuscate the issue by suggesting that those who did not receive dual benefits are "treated the same as anybody else in American society: He gets the social security benefit and he gets his railroad retirement benefit." *Id.*, at 49.

The pattern of confusion or deception thus has continued during the conception, birth, and short life of the 1974 Act. This pattern precluded both Congress and the affected former railroaders from attempting to correct the discrepancies. It allowed the bill's drafters to ignore the recommendations supporting vested rights, and to use the confusion surrounding the system's actuarial position actually to increase benefits for some beneficiaries as a result of the divestiture of the appellee class. This history alone suggests irrational legislation.

The unfair and invidious result of this legislation, however, is also readily apparent from an evaluation of the offending provision itself. This is not a situation in which Congress has selected the least palatable of several possi-

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[9] This argument of inequity or unworthiness of entitlement to benefits flies directly in the face of what Congress emphatically stated in its written report on the 1974 Act. Congress there decreed that "Dual beneficiaries cannot fairly be criticized, since they have merely secured the benefits to which they are entitled under existing law. That is why their equities should be preserved." H.R. Rep. No. 93-1345, 93d Cong., 2d Sess. 11 (1974).

ble alternatives, which is a permissible, if not preferable, exercise of its Constitutional function. *See e.g., Califano* v. *Aznavorian,* 439 U.S. 170 (1978). By contrast, in this instance, Congress, whether intentionally or otherwise, has discriminated against a distinct class of former railroaders whose duration of service in the industries for which they are insured is identical to that of their counterparts who are protected. The members of this class do not, like those in *Aznavorian,* just happen to fall on the wrong side of an arbitrary, but necessary eligibility condition; rather they were selected, as a class, for disaparate treatment, despite having the identical nexus of eligibility to the benefit programs as do the members of the protected class. This adverse treatment of a select class of individuals, apparently because of their political unpopularity and powerlessness among those undertaking the selection (rail union and rail management), represents the classic instance of a denial of equal protection. *See United States Department of Agriculture* v. *Moreno,* 413 U.S. 528, 534 (1973).

Even if it were demonstrable that further reduction in beneficiaries or benefits was necessary to protect the actuarial soundness of the fund, no legitimate rationale exists for this discrimination. As has been repeatedly noted, the savings of resources alone is not a sufficient rationale for invidious discrimination. *Shapiro* v. *Thompson,* 394 U.S. 618, 633 (1969); *Memorial Hospital* v. *Maricopa County,* 415 U.S. 250, 263 (1974); *Silbowitz* v. *Secretary of HEW,* 397 F.Supp. 862, 867 (S.D.Fla. 1975), *aff'd,* 430 U.S. 924 (1977); *Medora* v. *Colautti,* 602 F.2d 1149, 1153 n.9 (3d Cir. 1979). And this classification, on its face, is invidious. No precedent exists in the Railroad Retirement or Social Security systems for differential treatment based on the timing of covered em-

ployment. However inequitable dual benefits may or may not be, the decision to maintain them requires equal treatment of those similarly situated. Thus, there exists no valid reason why those who worked in the railroad industry for one day in 1974 (or for twelve months in the thirty months prior to January 1, 1975) should be fully protected while others with equal service time are not. The members of both groups had equally contributed to both Social Security and Railroad Retirement, and both had met the long-standing required conditions for eligibility in the two programs before the effective date.

Nor does this rationale become more persuasive on the theory that the "inactives" (i.e., those who did not meet the current connection or work-in-1974 tests) had "deserted" the railroad industry. The available evidence suggests that most of the appellee's class left because the declining railroad industry forced them out. Senator Domenici noted this factor: ["F]rom existing records and accounts, the majority of these former employees had no choice of staying with the railroads . . . . I believe [this] to be [an] important consideration today as we attempt to correct this justice." 123 Cong.Rec. S1448, *supra.* See also Affidavits of William Kirby and Horace Lindsey, filed Feb. 27, 1979. It was not disloyalty to the railroads which motivated the Committee's determination to sacrifice these individuals, but rather the Committee's members' lack of interest in or formal responsibility to former railroaders who were no longer union members. As Dennis expressed it: "I personally care less about . . . those who left the railroads . . . ." Burner Deposition, Exhibit I (March 20, 1974, JLMNC conference). Of course,

it is readily apparent that one day's service in 1974, for example, does not and should not determine "loyalty".

Moreover, loyalty to one industry or another even if it were otherwise properly ascertainable, cannot be the determinative factor in eliminating a benefit which derives from the integrated relationship between Social Security and Railroad Retirement. Since the relationship between Social Security and Railroad Retirement was an aspect of the overall problem of the railroad system, railroaders had the task of revising that relationship. That may explain their decision to rationalize the disparate treatment on the so-called grounds of "loyalty" to the railroad industry, but it does not rationally support favoring "loyalty" to one industry over another. Members of the two classifications had served in botn types of employment, had contributed to both programs, and derived their benefits from both. Consequently, even if loyalty could be rationally evaluated in the manner sanctioned by the Committee, and it is not, there is no logic in recognizing one type of employment as more important than the other.

The perceived inequity of providing any dual benefits, a perception criticized b yCongress as earlier noted, is irrelevant to the issue of this case. Once the determination was made that dual benefits were not be conclusively eliminated, Congress was required to provide similar treatment to all vested employees. The appellee class, therefore, must have its members' rights protected to the same extent as do those in the favored class.

CONCLUSION

The railroad retirement system is one of extreme complexity. In revising it through the 1974 Act, Congress did not simplify that system.[10] It therefore may seem incongrouous that plaintiff is here requesting the Court to affirm the district court's action without benefit of full briefing and oral argument. But this case, reduced to its relevant bottom line, involves a relatively simple issue: the disparate treatment of one class of vested beneficiaries for reasons unrelated to the work contribution which serves as the nexus of entitlement for Social Security and Railroad Retirement benefits.

The legislative history demonstrates conclusively that the primary purpose in restructurin the Act was to eliminate the railroad system's perceived financial weakness. A significant element of that effort was recognition of the distinction between vested and non-vested beneficiaries. Yet that distinction was not applied to the appellee class. The legislative history also establishes that the protection of the fund's financial soundness was not a factor in the decision to deny dual benefits to the appel-

[10] The Railroad Retirement Board's 1976 Annual Report made this observation: "A former Chief Actuary of the Board once commented that the railroad retirement system is so complex that it virtually defies verbal description. The new law, which became effective January 1, 1975, increased the complexity." 1976 Annual Report, at 57. Indeed, President Ford vetoed the 1974 Act in part because it failed to provide a comprehensible formula for computing one's retirement pension. Veto Message of President Ford of October 12, 1974, 120 Cong. Rec. H10546 (daily ed., Oct. 15, 1974).

lee class. Yet they were divested, in order to provide higher benefits to other beneficiaries. Moreover, the evidence is overwhelming that, at a minimum, Congress was not reasonably apprised of the effect of the challenged provision on the appellee class and, indeed, indicated in their statement of the purposes of the 1974 Act that appellee's class was fully protected.

Taken together, these factors evidence a disregard for equal treatment of similarly situated individuals. The reasons advanced for this discrimination are unrelated to the recognition of credited service; "loyalty" to one industry or another is not here involved and even if it were, such a factor has never been cited as a legitimate rationale for distinguishing between vested beneficiaries, all of whom have served the same periods of time and made the same contributions. The nexus of eligibility of all former railroaders for dual benefits is their vested entitlement under both programs.

The distinctions between the two groups on the basis of the timing of their railroad service is not an aspect of this nexus of eligibility, especially since such distinction was formulated after appellee's class had already achieved a vesting of their benefits in strict accordance with the law and had left the roads, many times not of their own volition, for other employment. For this reason, the Act creates an invidious discrimination, and the district court's conclusion to that effect should be affirmed.

Respectfully submitted,

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